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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 307.

ISBRANDTSEN-MOLLER CO., INC.,

Appellant,

—against—

THE UNITED STATES OF AMERICA, DANIEL C. ROPER, individually and as Secretary of Commerce of the United States, *et al.*,

Respondents.

REPLY BRIEF FOR APPELLANT ISBRANDTSEN-MOLLER CO., INC.

JAMES W. RYAN,
Counsel for Appellant.

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I.

We do not contend (as suggested at pp. 12, 48, 49, and 79 of the Government's Brief), that there should be "a fourth branch of government consisting of independent commissions or bureaus which exercise quasi-judicial and quasi-legislative powers". We contend to the contrary, and say that such a fourth branch is the logical result of counsel for the Government's own argument unless they are prepared to take the position that an executive officer can remain an executive officer after such extensive judicial and legislative duties of a non-partisan or bi-partisan nature have been thrust upon him that his principal or predominant function is that of a judicial or legislative officer.

The whole argument in the Government's brief on this point is based on the mistaken assumption that a board whose "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative" (*Humphrey's* v. *United States,* 295 U. S. 602, 624), is an executive agency "in the executive branch of the Government". Counsel for the Government ignore entirely the word "predominantly" which this Court used in stating the true principle in the *Humphrey's* case (295 U. S. 602, 624). They then cite, and rely on, decisions in cases in which it is obvious that the quasi-judicial or quasi-legislative action involved was a mere incident or subordinate matter in the general performance by an executive officer of duties which were predominantly of a strictly executive character.

The argument of counsel for the Government is the same as the argument of the President of the United States in his message yesterday to Congress, which is in substance that all non-partisan, judicial officers and agencies (excepting this Court and the District Courts and Circuit Courts of Appeal), and all bi-partisan legislative officers and agencies (excepting members of Congress), should be put under the control of, and made subordinate to, an executive or partisan officer or member of the President's Cabinet, simply because they have certain clerical or "housekeeping" work to do as an incident to the performance of their predominantly judicial or legislative functions, and this clerical work can be performed or "managed" by clerks in an executive bureau or department. On that principle there is no good reason for excepting this Court or Members of Congress from Executive control, their effective instrumentalities and subordinate but necessary means of performing their duties having been taken away, and we have a one-party government or dictatorship instead of a democratic or representative government. The

argument that the multitude of overlapping executive or partisan agencies and commissions, and Government "private corporations", should be put on a more efficient and economical basis, and more directly under Cabinet control, has merit, but that is not the argument made in this case in the Government's brief.

The failure in the Government's brief to give more than "summary" consideration (Government's Brief, pp. 50-51) to Title III of the Economy Act of June 30, 1932, in which Congress defined the non-partisan and geographically-representative and other necessary qualifications of the Shipping Board Commissioners exercising judicial and legislative functions, suggests that that part of the statute which was in effect on November 18, 1935 (when the order of the Secretary of Commerce, here involved, was issued) has not been given due consideration in contending that the Shipping Board is an executive or partisan agency. The language of the amendment of Title IV in 1933 affords no support for the contention that the President was being given authority to again "reorganize" the Shipping Board as a bureau under a purely executive officer after Congress had just finished reorganizing it on a permanent basis as a non-partisan judicial or legislative body not subject to executive control. Indeed the Shipping Board is not even mentioned in Title IV or in either of its amendments. (See Appendices A, B and C to this brief.)

It is conceded in the Government's brief that this Executive Order was issued under Title IV of the Economy Act (Government's Brief, pp. 2, 39, and 67). Indeed, the "section 16" mentioned in the quotation from the Executive Order at page 66 of the Government's brief as the basis of the order, is merely an amendment to Title IV of the Economy Act of June 30, 1932 (See Appendix B of this brief,—section 16 of

Title II of the amendment of March 3, 1933, to Title IV of the Economy Act of June 30, 1932). Therefore, the President was not purporting to interpret or construe Title III of the Economy Act. Nor is the language of Congress in Title III of the Act ambiguous. There is no room, therefore, for "administrative interpretation", and no presumption of regularity. Indeed, no such contention is made in the Government's brief. Consequently, there being no presumption of regularity, there can be no Congressional ratification by implication,—any ratification must be clear and unambiguous. Mere recitals or phrases, or descriptive references, will not do. Yet every bit of language taken out of its context in the so-called "ratifying" statutes by counsel for the Government in their brief is a mere recital or phrase or descriptive reference which is less than a complete indicative sentence or categorical statement.

Furthermore, Congress had no power under the Constitution (because of the separation of powers of Government into three independent branches) to grant to an executive officer the extensive and predominantly judicial and legislative functions of a non-partisan character which the United States Shipping Board possessed under the Shipping Act, 1916, and Merchant Marine Act, 1920. The Shipping Board Commissioners were either judicial officers or legislative officers, or both. They certainly were not executive officers, and their functions could not be constitutionally performed by an executive officer. Granting that it is impracticable to prohibit any exercise of judicial or legislative function by an executive officer, such exercise must be incidental, or at least must not be predominant; he must remain at all times predominantly an executive officer,—else the Constitution is violated because the three branches are not kept separate. It follows that even assuming

for purpose of argument that Congress had "ratified" the Executive Order (which it did not), Congress had no power under the Constitution to approve retrospectively, as of three years previously, an Executive Order which attempted to confer on an executive officer functions which were so predominantly judicial and legislative that his executive duties would immediately become subordinate and incidental and his judicial and legislative duties would become predominant. If this Executive Order is constitutional, and can be "ratified" by Congress, what, on the same principle, is the legal or practical objection to the President issuing a valid Executive Order putting this Court or Congress under control of an executive officer! If the Constitutional doctrine of separation of powers is insufficient ground for invalidating as beyond possibility of legislative ratification an Executive Order attempting to make an executive officer a predominantly judicial and legislative officer, why is it necessary for the President to obtain any authority at all from Congress? If Congress is not bound by that Constitutional doctrine, then the President is not bound, and no "ratification" by Congress is needed.

There might be good reason to require that every office, commission, or bureau in the Government be put definitely in a designated one of the three branches of government, so that, if judicial, its decisions may be reviewable by a proper appellate court or this Court, and if legislative it would work under the direct supervision of Congress (like the Federal Radio Commission; see *Radio Comm'n.* v. *Nelson Bros. Co.,* 289 U. S. 266, 276), and, if executive, it would be under the direct control of the President or the head of one of the Executive Departments. But if that principle were applied in the present case the non-partisian Shipping Board, and the Secretary of Commerce if he is its suc-

cessor (and the similarly non-partisan and judicial or legislative commissions composed of experts in their field, such as the Interstate Commerce Commission and the Federal Trade Commission), would be in the judicial branch or the legislative branch, and the President would have no control over them.

Indeed that principle has already been substantially applied to the Shipping Board, because a right of appeal now lies from its judicial decisions to a three-Judge statutory District Court (the same as from decisions of the Interstate Commerce Commission), and after that there is a right of direct appeal to this Court. Section 31, Shipping Act, 1916. Also it is required to report and make recommendations annually to Congress on a few matters not material here. Section 12, Shipping Act, 1916. And until the Secretary of Commerce attempted to take charge, the personnel of the managing officers of the "private corporation" operating Government merchant vessels was kept entirely distinct and independent from the Commissioners and employees of the Shipping Board. Indeed the corporation was formed for the very purpose of avoiding the obvious incompatibility between its functions (as stated in its charter) and those of the Shipping Board.

The fact that after the Executive Order was issued the Secretary of Commerce issued a memorandum on August 9, 1933, continuing "the present members of the Shipping Board" (R. 47) as "included" in an "advisory committee" to which he might if he desired "refer any questions" (R. 47), is insufficient to show that they functioned in such an anomalous position, or were accorded a degree of independence within the Department, instead of being reduced to bureau status or less. Indeed, the Official Register of the United States, 1934, does not list them at all as being in the Department of Commerce.

Title III of the Economy Act of June 30, 1932 (47 U. S. Stats. at Large 408) reorganizing the United States Shipping Board on a permanent basis, remained on the statute books in full force, and not amended or repealed in any respect whatever, until June 29, 1936, when the Merchant Marine Act, 1936 (c. 858, 49 Stat. 1986) was enacted, repealing Title III of the Economy Act of June 30, 1932, by providing for the nomination by the President, with the advice and consent of the Senate, of five Commissioners to constitute a new, non-partisan, nationally-representative, and predominantly judicial and legislative body to be known as the United States Maritime Commission, and to take over "All the functions, powers, and duties vested in the former United States Shipping Board by the Shipping Act, 1916, the Merchant Marine Act, 1920, * * *."

No statute was enacted between June 30, 1932, and June 29, 1936, which could possibly be regarded as a repeal of the detailed provisions in Title III of the Economy Act of June 30, 1932, with respect to the newly-reorganized Shipping Board. Indeed there is no contention in the Government's brief that Congress enacted any statute during that period which repealed or amended Title III of the Economy Act of June 30, 1932. The contention in the Government's brief in substance (although it is stated in the anomalous form of "ratification") is that an Executive Order issued by the President on June 10, 1933, under Title IV of the Economy Act of June 30, 1932 (47 Stats. 414), as amended, 47 Stats. 1517; 48 Stats. 16 (with reference to executive agencies "in the executive branch of the Government"), constituted a repeal of Title III of the Economy Act of June 30, 1932, 47 Stats. 408 (which expressly named the United States Shipping Board and provided in detail for its permanent continuance as a non-partisan judicial and legislative body consisting of

three Commissioners nominated by the President of the United States and to be confirmed by the Senate). This contention in substance in the Government's brief that the President can by mere Executive Order repeal an Act of Congress is novel and, if pressed to its logical consequences, leads to startling and far-reaching results. It makes the Executive a dictator, supreme over Congress. The independence of the legislative branch of the Government is terminated, and the Constitutional principle of separation of powers of Government into three branches is violated.

The exigency of their case forces Government counsel to rely on this contention. On November 18, 1935, when the order of the Secretary of Commerce here involved was issued, Title III of the Economy Act of June 30, 1932 (47 Stat. 408), was on the statute books, unamended and unrepealed. It was the law of the land. According to its express provisions there was a non-partisan United States Shipping Board in existence, consisting of three Commissioners, and nothing short of death itself (or removal for misfeasance) could terminate their functioning unless their fixed terms should expire and their successors should be appointed and qualify. No order issued by the Secretary of Commerce on that date could possibly be an order of the United States Shipping Board unless the President of the United States had the power to override Title III of the Economy Act by issuing an Executive Order under Title IV of that Act.

To meet this difficulty the contention is made in effect in the Government's brief that a mere recital or mention of that Executive Order in certain Appropriation Acts in making appropriations during that period for a bureau in the Department of Commerce constituted a repeal by Congress of the detailed provisions in Title III of the Economy Act of June 30, 1932, with

reference to the Shipping Board. But none of those Appropriation Acts even mentions Title III of the Economy Act of June 30, 1932. And aside from the fact that such recitals in the Appropriation Acts are not sufficiently clear and unambiguous to constitute a repeal of Title III, the contention is without merit because as pointed out in our main brief, the only sections of the Shipping Act, 1916, and Merchant Marine Act, 1920, mentioned in those recitals, deal with purely administratrive functions as distinguished from the regulatory, or quasi-judicial and quasi-legislative functions here involved.

Finally the contention is made in effect in the Government's brief that the Merchant Marine Act, 1936 (c. 858, 49 Stat. 1986), not merely repealed Title III of the Economy Act of June 30, 1932, but also "ratified" the Executive Order which had been issued on June 10, 1933, under Title IV of that Act on the mistaken assumption that the Shipping Board was an executive agency "in the executive branch of the Government". It is difficult to conceive how a statute could have this hybrid character, or effect such a change in the constitutional separation of powers. But aside from that, it is evident from the language in the Merchant Marine Act, 1936, that Congress mentioned the bureau in the Department of Commerce only by way of recital, and was merely terminating any authority, presumably administrative, that it might have. Congress' principal intention in the Merchant Marine Act, 1936, was to create a nonpartisan judicial and legislative commission as a successor to the United States Shipping Board originally created in the Shipping Act, 1916. It wasn't trying to "ratify" anything, and the word "ratify", or any synonym of it, does not appear anywhere in the Act.

Indeed the question of "ratification" by Congress of an Executive Order, argued in the Government's brief,

is not presented on the facts of this case. The statute—Title III of the Economy Act of June 30, 1932,—remained at all times unamended and unrepealed on the statute books until June 29, 1936, when the Merchant Marine Act, 1936, was enacted. No Executive Order was authorized to be issued under Title III, and none was so issued; and any Executive Order issued under Title IV relating to executive agencies "in the executive branch of the Government" must necessarily have had for its object the reorganization of executive agencies which had not already been reorganized directly by Congress itself in Title III of that Act. The Shipping Board was so reorganized by Congress in Title III, and no authority was granted the President in Title IV to do that job over again on some different basis so that Congress' work of reorganization of the Shipping Board, just finished, would be upset and so that the Board would become a purely executive agency rather than a nonpartisan and predominantly judicial and legislative body.

Just before the Merchant Marine Act, 1936, was enacted, the situation confronting Congress was that a statute—Title III of the Economy Act of June 30, 1932—was in full force and effect, providing for the permanent continuance of the non partisan Shipping Board of three Commissioners on the basis of a reorganization effected directly by Congress in that statute. The President of the United States had completed that Congressional reorganization in the year 1933 when he nominated three Commissioners and the Senate confirmed them. There was nothing the President of the United States could validly do after that in the way of abolishing the Shipping Board or removing any of its Commissioners excepting for misfeasance. Consequently the only question then before Congress was whether it should do nothing or should repeal Title III of the Economy Act by enacting a statute

creating a new Shipping Board of the same non-partisan and predominantly judicial and legislative type but with a larger number (five) of Commissioners also selected on a national or geographically-representative basis, and with more detailed or different powers. No question of ratification of unauthorized activities of the President was presented for decision; and there is nothing whatever in the legislative debates in the Congressional Record or in the Congressional Committee hearings to support the contention that the President had applied to Congress to have it ratify an unauthorized action by him, or an invalid Executive Order issued by him. Nor is there anything in those Debates or Hearings to indicate that any Congressman had the slightest idea that Congress was ratifying an unauthorized action or invalid Executive Order of the President. The debates and hearings show that Congress was then merely repealing Title III of the Economy Act of June 30, 1932, by creating, as a substitute, a larger non-partisan board or commission of the same type and with the same predominantly judicial and legislative functions.

No more complete change could be imagined than for the appellant steamship company to be told one day that it was being regulated by a non-partisan and nationally representative body of Commissioners exercising predominantly judicial and legislative functions, and to be told the next day that because of an Executive Order it was now being regulated by a purely executive officer who happened to be appellant's chief competitor in the steamship business.

Where is that Executive Order? It is not in the Record, nor is a copy of it appended to the Government's brief in this case. There is a partial quotation from it in a note at the bottom of page 66 of the

Government's brief, but the part quoted is not contained in any printed publication or other paper that appellant has been able to find. It is not printed in the "Federal Register", which began publication late in the year 1934 after this Court's decision in the case of *Panama Refining Co.* v. *Ryan,* 293 U. S. 388. At the oral argument of that case this Court said that an Executive Order could hardly be binding on the public if it was not published in an official publication available to the public. The Executive Order involved in that case was issued on July 11, 1933 (293 U. S., at p. 405). The Executive Order on which respondents rely in the present case was issued a month earlier, on June 10, 1933. The Executive Order involved in the present case is mentioned at pages 2, 38, 54 and 85 of the Government's brief, but in no instance is reference made to any publication or report in which a copy of it may be found. Appellant's counsel has found what is evidently a part of that Executive Order printed as a kind of note at the end of Section 132 of Title 5, United States Code. That note, however, contains none of the quotation from the Executive Order made on page 66 of the Government's brief in this case.

In *Carter* v. *Carter,* 298 U. S. 238, at page 311, this Court said:

> "The difference between *producing coal* and *regulating its production is, of course, fundamental.* The former is a private activity; *the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor.* And a statute which attempts to confer such power undertakes an intolerable and *unconstitutional interference with personal liberty and private property.* The delegation

is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. *Schechter Corp.* v. *United States,* 295 U. S. at p. 537; *Eubank* v. *Richmond,* 226 U. S. 137, 143; *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116, 121-122." (Italics ours).

In the Economy Act of June 30, 1932, Public No. 212, Seventy-second Congress (47 U. S. Statutes at Large 382), Congress itself in Title III. reorganized the Shipping Board on a permanent basis as a non-partisan and nationally-representative body, independent of the Executive, with predominantly judicial and legislative functions, and reduced the number of Commissioners from seven to three, and made several other changes in the interest of economy and efficiency, and in Title IV. of the same Economy Act authorized the President to reorganize the executive agencies "in the executive branch of the government".

On July 30, 1932, while Congress was in recess, the President of the United States reorganized the Shipping Board in accordance with Title III. of the Economy Act of June 30, 1932, by appointing the three Commissioners to constitute the new Board,—T. V. O'Connor, Atlantic coast representative, Chairman, for a term of three years from June 30, 1932; Samuel S. Sandberg, Pacific coast representative, for a term of two years from June 30, 1932; and Hutch I. Cone, Gulf coast representative, for a term of one year from June 30, 1932. (See Appendix E to this brief.)

On January 3, 1933, the nominations of the three Commissioners above-named were submitted by the President to the Senate. As no action was taken by the Senate on their nominations the recess appointments

automatically terminated with the adjournment of the Seventy-second Congress on March 4, 1933.

On March 3, 1933, Congress enacted an amendment (47 U. S. Statutes at Large 1517) to Title IV. (relating to executive agencies) of the Economy Act of June 30, 1932, making minor changes in that Title, principally with respect to the President's required investigations and findings, but making no change whatever in Title III. (47 U. S. Statutes at Large 408) of that Economy Act relating to the reorganization of the Shipping Board.

On March 4, 1933, a new President of the United States assumed office.

On March 15, 1933, the President of the United States, in accordance with Title III. (relating to reorganization of the Shipping Board) of the Economy Act of June 30, 1932, forwarded to the Senate the nominations of three Commissioners to constitute the newly-reorganized Shipping Board,—Hutch I. Cone of Florida, representing the Gulf coast, for a term of three years from June 30, 1932; David W. Todd of New York, representing the Atlantic coast, for a term of one year from June 30, 1932; and Gatewood S. Lincoln of California, representing the Pacific coast, for a term of two years from June 30, 1932. (See Appendix E to this brief.)

On March 20, 1933, the Senate confirmed the nominations.

Although Commissioner Todd's term of office expired at midnight June 29, 1933, he continued to function under the provision of Title III. of the Economy Act of June 30, 1932, that notwithstanding a Commissioner's period of office for a fixed term of years should expire, he should continue in office indefinitely until the appointment and qualification of his successor. (No successor has been appointed or has qualified to any of the three Commissioners,—Todd, Cone, or Lincoln.)

On June 10, 1933, with the Shipping Board thus reorganized on a permanent basis under Title III of the Economy Act by both Congress and the President, the President by Executive Order undertook anew a different kind of reorganization, this time on the assumption that the Shipping Board was an executive agency "in the executive branch of the government" under Title IV. of the Economy Act, thus ignoring the detailed provisions in Title III. of the Economy Act with respect to the reorganization of the Shipping Board after describing it by name. The whole Shipping Board was, by this Executive Order, eliminated as a non-partisan body, and as a predominantly judicial and legislative body, and it was put directly under the personal control of a member of the President's Cabinet. The Executive Order purported by indirection to dismiss all the Commissioners of the Shipping Board from office; and in providing the "Department of Commerce" as a substitute to perform their functions, no provision was made that the substitutes be selected on a nationally or geographically-representative basis; nor was any provision made that "Not more than two of the Commissioners shall be appointed from the same political party" (Economy Act, 47 U. S. Statutes at Large 382). The regulation of the whole shipping business of the country was thus put under the exclusive control of one political party. The Executive Order purported to abolish the Shipping Board entirely and to transfer, effective August 10, 1933, all its functions to the "Department of Commerce" under authority of Title IV. (relating to executive agencies in the executive branch of the government) of the Economy Act. The Executive Order was sent to Congress with numerous other documents on June 10, 1933.

On June 15, 1933, Senator White of Maine learned

of the Executive Order and stated (Cong. Rec., Vol. 77, p. 6154):

> "The Shipping Board and the Emergency Fleet Corporation have a multitude of duties and responsibilities. There are many operative functions of both which I think might well be transferred to the Department of Commerce, but the Shipping Board is a regulatory body, having quasi-judicial functions. It has a wide range of authority over water rates in both interstate and foreign commerce. It has jurisdiction, and it acts, when it exercises that jurisdiction, in a judicial capacity, over rates, rebates, discriminations, preferences and practices of water carriers and all manner of questions of that sort. *It is utterly inconceivable to me that those authorities can properly be transferred to and be exercised by an official of the Department of Commerce.*" (Italics ours.)

Congress was then in a legislative "jam" on other matters, and adjourned *sine die* on the next day, June 16, 1933. Senator White, when in the House, had been for many years Chairman of the House Committee on Merchant Marine and Fisheries, and had presided over the hearings in connection with the drafting and enactment of the several shipping Acts. Later, on being elected to the Senate, he became a leading member of the Senate Committee on Commerce, which has charge of shipping legislation. His dramatic outcry on the floor of the Senate in an effort to halt what he believed to be an obviously invalid Executive Order was ignored by the President of the United States and by the Secretary of Commerce.

On April 30, 1935, one of the respondents in the present case, James C. Peacock, admitted to the House

Committee on Merchant Marine and Fisheries as follows:

> "Mr. Peacock: I may say personally I feel that the regulatory functions are out of place in an executive department" (p. 403, Hearings before House Committee on Merchant Marine and Fisheries, 74th Congress, 1st session on H. R. 7521, to develop an American Merchant Marine).

Although counsel for the Secretary of Commerce quote in their brief from discussion or debate in Congress, they do not, we respectfully submit, quote an adequate summary of those debates. They quote isolated remarks of Mr. Ludlow and Mr. Mapes, Members of Congress. Counsel for the Secretary of Commerce ignore entirely in their brief the deliberate and earnest attack on the validity of the Executive Order by the Senator who was Chairman for many years of the Congressional Committee directly in charge of shipping legislation. We annex as Appendix "D" to this brief quotations from the legislative debates in the Congressional Record.

On that last day of the session, June 16, 1933, Congress appropriated money for the salaries of the three Commissioners of the Shipping Board until the end of the fiscal year, namely, June 30, 1934.

Congress thereupon being in adjournment, the American Steamship Owners' Association, representing substantially every steamship company in the United States, filed through its legal counsel, Messrs. Kirlin, Campbell, Hickox, Keating & McGrann of New York City, a formal protest against the Executive Order, in the form of a legal opinion by that firm that it was wholly invalid. This protest was referred to the Attorney General of the United States, who shortly afterwards filed a very short opinion that the Executive Order was valid. That opinion is published in volume

37, Opinions of the Attorney General of the United States, at page 238.

On August 9, 1933, the Secretary of Commerce issued an "order" or memorandum that "the present members of the Shipping Board" are to be an "advisory Committee" to the Secretary of Commerce on matters he "may" refer to them from time to time, and whose advice he may follow or not as he chooses. (R. 47.)

On December 1, 1933, the three Commissioners of the United States Shipping Board,—Hutch I. Cone, Chairman, David W. Todd, Vice Chairman, and Gatewood S. Lincoln, Commissioner,—transmitted to Congress "the seventeenth annual report of the United States Shipping Board and the United States Shipping Board Merchant Fleet Corporation covering the fiscal year ended June 30, 1933" (U. S. Shipping Board Report to Congress, dated December 1, 1933, p. v; Appendix E to this brief).

The "Official Register of the United States, 1934", at page 109 (Government Printing Office, Washington, 1935), shows that a United States Shipping Board "bureau", apparently set up by the Secretary of Commerce, consisted of:

(a) three employees of the Merchant Fleet Corporation (H. S. Brown, "Acting Chief, Division of Regulation"; S. D. Schell, "Assistant to the Director"; and F. G. Frieser, "Chief, Division of Traffic");

(b) a "Director", J. C. Peacock (who, the evidence in the present Record shows, was the President of the Merchant Fleet Corporation, R. 36, 26, 12-13);

(c) a "Chief, Division of Shipping Research" (A. H. Haag); and

(d) a "Chief, Division of Loans and Sales" (J. W. Barnett).*

None of these men was an "officer of the United States", that is, a person nominated by the President and confirmed by the Senate; nor did any of them hold a "commission" from the President of the United States; nor did any of them hold any statutory position. Even the "bureau" itself was set up without statutory authority. There is nothing to indicate that any of those six men was employed in any capacity in the "Department of Commerce" at the time the Executive Order became effective.

Three (Peacock, Shell and Haag) of the six men were "from the same State" (Maryland) (p. 109, Official Register of the United States, 1934), in spite of

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* At page 109 of the "Official Register of the United States, 1934" (published by the Government Printing Office, Washington, 1935), it is stated:

"DEPARTMENT OF COMMERCE

Name	Official Title and Station	*Legal residence* State	Cong. dist.		Compensation
United States Shipping Board Bureau					
J. C. Peacock	Director	Md.	6th		8,000
S. Duvall Schell	Assistant to Director	Md.	6th		(16)
F. G. Frieser	Chief, Division of Traffic	N. J.	9th	(17)	6,500
A. H. Haag	Chief, Division of Shipping Research	Md.	4th		8,000
J. W. Barnett	Chief, Division of Loans and Sales	Ohio	8th		10,000
H. S. Brown	Acting Chief, Division of Regulation	Mass.	2d	(17)	6,500

16 Salary as Secretary, Merchant Fleet Corporation.
17 Paid from Merchant Fleet Corporation funds."

the express requirement by Congress in Title III of the Economy Act that "not more than one (Commissioner of the United States Shipping Board) shall be appointed from the same State". And none of the six men complied with the requirement by Congress in Title III of the Economy Act that "One of such commissioners shall be appointed from the States touching the Pacific Ocean", or with the requirement that there be "one (Commissioner) from the States touching the Gulf of Mexico."

The Merchant Fleet Corporation is a private corporation organized under the general corporation laws of the District of Columbia. The two employees of that corporation (H. S. Brown and S. D. Schell) whose affidavits were introduced by counsel for the Secretary of Commerce at the hearing in the District Court in the present case, as the principal defense or evidence of the respondent Secretary of Commerce (R. 37, 42), were thus not employees of the Department of Commerce but were employees of a private corporation. It appears from those affidavits that those two employees of the Merchant Fleet Corporation were in every substantial sense the persons actually formulating and issuing the order of the Secretary of Commerce sought to be enjoined. And the uncontradicted allegations in the complaint (R. 12-13) and evidence in the Record (R. 36, 26) establish that James C. Peacock, the "Director" of the Shipping Board "bureau", was in fact the active President of the Merchant Fleet Corporation.

It is inconceivable that Congress by the Economy Act intended to authorize the President to wipe out of existence the entire United States Shipping Board and all its Commissioners, who were "officers of the United States", and to "transfer" all its non-partisan and quasi-judicial and quasi-legislative functions to the employees or officers of a private steamship corpora-

tion. Congress clearly expressed its intent in the Economy Act that the persons who should be its legislative agents and/or judicial officers in performing the quasi-legislative and quasi-judicial functions of the United States Shipping Board should be officers of the United States nominated by the president and confirmed by the Senate and holding office for fixed terms of years without power by the executive branch of the Government to control the performance by them of their functions or to remove them from office. The Executive Order transferring the duties of those officers to undesignated employees in the Department of Commerce violates that intent.

As we have shown, no fourth branch of the government is necessary. That statement or assumption, repeatedly made in the Government's brief (Government's Brief, pp. 12, 48, 49 and 79), and to which a large part of its brief is devoted, is answered at page 48 of our main brief. The law, without losing any substantial part of its certainty or of its effectiveness in definition and application, has always necessarily dealt with questions of degree, and with terms defined with less than mathematical exactitude, for instance, the term "unreasonable restraint of trade" (*Standard Oil Co.* v. *United States*, 221 U. S. 1).

The initial and primary question here is whether the body of Commissioners constituting the Shipping Board was predominantly in the judicial branch or in the legislative branch (or in both), rather than in the executive branch. If it was, then it was not an executive agency or independent establishment "in the executive branch of the Government", which is the definite limitation imposed by Congress in the Economy Act on the President's field of activity in effecting transfer, abolition, or other reorganization.

Congress clearly expressed its intention in the Economy Act that even within the executive branch of the Government regulatory agencies should be separated or segregated by the President from administrative agencies. Section 401 of the Economy Act, stating its purposes, provides:

> "(f) To segregate regulatory agencies and functions from those of an administrative and executive character."

A fortiori, a regulatory body which was exercising predominantly quasi-judicial and quasi-legislative functions and which was not within the executive branch of the Government should not have been combined or consolidated by the President with an administrative or strictly executive and political agent such as the Department of Commerce or the Secretary of Commerce. To do so was to violate the legislative standard set up by Congress within which the President was necessarily restricted while acting as legislative agent in effecting reorganization,—or, more strictly speaking, while he was investigating and finding the specific facts which would bring into application the legislative standard or rule already set up by Congress.

Congress granted no discretion to the President to ignore its direction that regulatory agencies be separated from "those of an administrative and executive character". And he could not validly resort to any of the other purposes of the Economy Act for the purpose of avoiding the clearly expressed Congressional intent or legislative standard that regulatory agencies should be separated from those of an administrative and executive character. An examination of the Executive Order fails to disclose which of the legislative standards set up by Congress in the Economy Act the President was purporting to bring into application by

his investigation and finding. The investigation, finding and standard are so vaguely referred to in the Executive Order that it is mere speculation what standard was being applied. Presumably, however, since a regulatory agency was being transferred to, or consolidated with, an administrative and executive agency, the standard being applied was the one providing that regulatory agencies should be segregated from those of an administrative and executive character. That being so, the Executive Order of June 10, 1933 was invalid for that reason alone.

Counsel for the Secretary of Commerce make no effort in their brief to meet the real issue pointed out in our main brief (Appellant's Brief, pp. 46 and 47), which is whether or not the recitals they and the District Court mention in the Appropriation Acts are so clear and unambiguous that they can be considered a repeal by Congress of the unambiguous and detailed provisions in Title III of the Economy Act with reference to the permanent reorganization and continuance of the Shipping Board as a non-partisan body of experts or local representatives independent of the Executive. They devote much of their brief to a so-called "ratification" by Congress of the Executive Order of June 10, 1933, issued under the Economy Act. They contend in substance that that ratification makes the Executive Order a statute or law of the United States which is a substitute for the numerous express provisions by Congress under another title in that Economy Act constituting a reorganization directly by Congress of the United States Shipping Board on a reduced and more efficient basis so far as the number of commissioners and other economies and simplifications are concerned, and providing for the permanent continuance of that board independently of the executive branch of the Government as a quasi-judicial and quasi-legislative

body of three commissioners nominated by the President and confirmed by the Senate and holding office for fixed terms of years and whose terms are never to expire "until their successors are appointed and qualify" (Title III of Economy Act—Act of Congress of June 30, 1932, 47 U. S. Statutes at Large 382). This last provision which was not in the original Shipping Act, 1916, or in the Merchant Marine Act, 1920, shows a definite, clear and specific intent of Congress that the board was never to cease to exist as a quasi-judicial and quasi-legislative body independent of the executive branch of the Government. Congress by that provision clearly intended to prevent the President from attempting to assume control over the Shipping Board, or to interfere with its proper functioning as a body independent of the Executive by failing to nominate commissioners when vacancies should occur. The historical fact is that certain earlier Presidents of the United States had attempted to assume control over the Shipping Board by failing to appoint commissioners when vacancies had occurred. The control by the President would automatically follow when the vacancies not filled were those which the President was required by Congress to fill by nomination of the opposing political party or by nomination of a person from a designated geographical section of the country that the President did not wish represented on the board, notwithstanding Congress' intention. By mere failure to nominate commissioners to fill vacancies, the President could (before Title III of the Economy Act of June 30, 1932, was enacted) thus terminate the truly national and geographical representative character of the Shipping Board as elaborately provided for by Congress and could also change its character from that of a predominantly judicial and legislative body independent of the Executive to a predominantly political body rep-

resenting only the political faith and doctrine of the political party in power and subject in effect to direct domination by the President. Indeed the President of the United States did thus exercise control by permitting the Shipping Board to function for a substantial period of time as a board of one commissioner (although Congress had expressly provided for a nationally-representative board of seven commissioners), and permitted it to function for another still more substantial period as a board of only two commissioners. This was the evil which Congress was trying to remedy in the Title (Title III) in the Economy Act, in which it itself reorganized the Shipping Board on an economy basis and provided for its permanent continuance without power of the Executive or President ever to assume control over it. The Executive Order of June 10, 1933, cannot be regarded as a repeal of those statutory provisions by Congress itself, nor can it in any sense be regarded as tending to remedy that evil; instead the Executive Order tends to accentuate it.

The fact is the President did nominate and the Senate did confirm the three new commissioners of the United States Shipping Board provided for in Title III of the Economy Act, and under the express terms of that Act they continue in office until their successors have been nominated and confirmed and have qualified and begun to act.

The anomalous results of the Executive Order of June 10, 1933 in practical application are shown by the affidavit of R. H. Hallett, which was introduced in evidence by counsel for the Secretary of Commerce at the hearing of the present case in the District Court, and which shows that even after the President had "transferred" the Shipping Board to the Department of Commerce, "the present members of the Shipping Board" (R. 47) were thereafter to continue as such,

but were merely to function as an "advisory committee" to the Secretary of Commerce, which the latter could ignore or not as he chose (R. 47), and whose advice need not even be considered by him (R. 47).

II.

At pages 15 and 16 of the Government's brief, the "purposes" of Section 21 of the Shipping Act, 1916, (under which the Secretary of Commerce's order purports to have been issued), are stated as being to enforce Sections 14, 15, 16, and 17 of the Shipping Act, 1916 (U. S. Code, title 46, sections 812, 813, 814, 815, and 816). It was pointed out in our main brief (Appellant's brief, page 33) that each of those sections prohibits, under specified penalty, the commission of a defined offense; that the Shipping Board functions as a judicial body in respect to a violation of those sections; and that by the very terms of the Shipping Act, 1916, they can be enforced only by filing a complaint or proceeding against appellant charging a specific violation. There is no answer in the Government's brief to this point.

The Record affords no support for the contention that other steamship companies are filing with the Secretary of Commerce the rate and current business transaction records demanded of appellant by this order of November 18, 1935. The allegations of the complaint, and the appellant's evidence, are uncontradicted that what the other steamship companies file is merely a schedule of rates to be charged in the future, which they are not required by law or any regulation to adhere to, and which has been fixed by agreement of a majority in a conference or shipping combination, and which can be wholly abandoned five minutes after the schedule has been filed by the representatives of the majority in the

conference agreeing on a new schedule or rate which they do not have to file with the Shipping Board (or the Secretary of Commerce) until the expiration of thirty days after they have put it into effect. There is no law whatever requiring that conference agreements as to schedules of rates or any other matters be lived up to or performed. The only reason those schedules of rates are filed by the other companies is because Congress has provided in section 15 of the Shipping Act, 1916, that they must do so to avoid being prosecuted as an illegal combination in restraint of trade in violation of the Anti-Trust Act.

Appellant is the only steamship company operating in American foreign commerce which is being required by the Secretary of Commerce to file its actual rate and current business transaction records; and in addition the uncontradicted allegation in the complaint is that the Secretary of Commerce has notified appellant in writing that if appellant does file those current records, the Secretary of Commerce will immediately divulge them to appellant's competitors in the shipping combination and to the public generally (R. 7). Such a wholesale publicizing to competitors of all of appellant's current business transactions and commodity-movement records, by special order directed only against appellant, is bound to increase enormously competitive pressure on appellant by appellant's competitors in the shipping trust. It is a penalty and unjust discrimination against appellant of the most drastic kind; and no other steamship company is subject to it.

The order requires appellant to file a copy or summary of every business transaction record in its possession, showing every particular commodity carried, and between exactly what points carried, and the rate actually collected, and the date collected or effective, etc. With factual information of that kind from appel-

lant's records, the most stupid competitor could easily identify every customer of appellant and the nature and extent of his business as shown by his designated commodities moving on appellant's vessels between named points at given times. And the Secretary of Commerce has notified appellant in writing that on being filed with him, all of that information from appellant's records will be made public (R. 7). Yet the Secretary of Commerce is a "common carrier by water", being the operator of merchant vessels as common carriers for hire in the same trade in competition with those of appellant, and Section 20 of the Shipping Act, 1916, makes it unlawful for a common carrier by water, or "for any other person authorized by such carrier or person to receive information", to

> "disclose to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, *any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier* or other person subject to this Act for transportation in interstate or foreign commerce, which information *may* be used to the detriment or prejudice of such shipper or consignee, or which *may* improperly *disclose his business transactions to a competitor,* or which *may* be *used to the detriment or prejudice of any carrier;* and *it shall also be unlawful for any person to solicit* or knowingly receive any *such information which may be so used.* Nothing in this Act shall be construed to prevent the giving of such information in response to any legal process issued under the authority of any court, or to any officer or agent of the Government of the United States, or of any State, Territory, District, or possession thereof, *in the exercise of his powers,* * * *." (Italics ours.)

It is exactly such "information concerning the nature, kind, quantity, destination, consignee, *or* routing of" property "tendered or delivered to" appellant as a common carrier, that the order of the Secretary of Commerce of November 18, 1935, here involved demands. In other words, unless the Secretary of Commerce is acting "in the exercise of his powers", he is demanding that appellant violate the law and seriously injure every one of the American shippers on appellant's vessels, and also injure appellant's business. What shipper in his right senses would ship goods on appellant's vessels if he knew that appellant alone of all steamship companies was divulging the private business transactions of his shippers to a carrier in the shipping combination or trust whose financial interests were tied up with those of that shipper's competitors who were shipping on conference vessels to the same markets!

And in view of that law on the statute books, how can it be seriously contended that the Secretary of Commerce is acting "in the exercise of his powers" in notifying appellant in writing that all such information, immediately on being filed will be made public to all appellant's competitors and to all its shippers' competitors!

The Secretary of Commerce's order thus constitutes a threat to appellant that, on the one hand, if it complies with the order, it will destroy its own and its customers' business, and, on the other hand, if it does not comply with the order it will be subjected to severe penalties. Appellant was forced to the latter alternative to protect its legal and constitutional rights against the arbitrary and unreasonable seizure and publicizing of its and its customers' private records of current business transactions.

This Record establishes that the Secretary of Com-

merce, by a forced interpretation of his duties under Section 15 of the Shipping Act, 1916, has been in effect establishing and maintaining a shipping trust or complete shipping monopoly in American foreign commerce, —a system of codes or "conference agreements" in ocean shipping. And he has continued in this in the face of the fact that every conference in that monopoly is wholly beyond his power to regulate, because foreign-flag steamship companies constitute a majority dominating every one of the conferences or combinations. The order of November 18, 1935, here involved, is in substance an effort, under threat of heavy penalties, to compel appellant to join the shipping monopoly. Yet Congress plainly provided in Section 15 and other sections of the Shipping Act, 1916, and of the Merchant Marine Act, 1920, that it should be entirely optional and voluntary with a carrier whether or not it should join a conference or combination. Indeed Congress' language indicates an intent to discourage such combinations as monopolies or evils obviously detrimental to the public interest (as this Court has already held in *Thomsen* v. *Cayser,* 243 U. S. 66), and to tolerate them only under special and rare circumstances.

This complaint alleges that the conference companies, including the Secretary of Commerce as a member of the conferences, have entered into monopoly agreements of an "exclusive contract" nature which are identical with the one condemned by this Court as an unlawful restraint of trade in *Thomsen* v. *Cayser,* 243 U. S. 66. That also constitutes unfair competition and unjust discrimination because the Secretary of Commerce is approving, so far as "conference" companies are concerned, a type of coercive rate agreement which it would be unlawful for an independent steamship company to enter into. The "exclusive contract" agreement is in substance that a large rebate will be given to a shipper if he will ship his goods only on vessels

which are members of the conference or shipping trust. The Secretary of Commerce has approved that as fair competition and lawful so far as conference vessels are concerned, but unfair competition and unlawful (as in violation of the "deferred rebate" subdivision of Section 14 of the Shipping Act, 1916) so far as independent or non-conference steamship companies in foreign commerce are concerned and so far as vessels in "intercoastal" commerce are concerned.

Consequently if appellant is compelled to observe the order of November 18, 1935, of the Secretary of Commerce, by divulging to its conference-line competitors all its current rate and commodity-movement transactions between designated points, so that its rates and customers are "known" to them, then they can take all appellant's business away from it by giving a rebate to those shippers in the guise of an "exclusive contract" agreement which it would be illegal for appellant as a non-conference company to enter into with its shippers.

The representatives of the Secretary of Commerce, as operator of vessels entered in the conferences or shipping combinations competing with appellant, vote upon conference decisions. The actions taken as a result of such decisions frequently come before the Secretary of Commerce in his regulatory duties under Section 15 of the Shipping Act, 1916, to decide whether or not such action violates the law (See pp. 386 and 387, Hearings on H. R. 7521, by the House Committee on Merchant Marine and Fisheries, 74th Congress, 1st Session). That is the situation in the present case. The Secretary of Commerce, as alleged without contradiction in the complaint (R. 12, 26), has, as operator of vessels, joined conferences or shipping combinations competing with appellant which have decided to coerce appellant and American exporters by adopting by conference agree-

ment the "exclusive contract" or deferred-rebate system which this Court held in the case of *Thomsen* v. *Cayser,* 243 U. S. 66, was a violation of the Sherman Anti-Trust Law, and which is further condemned in the "deferred rebate" subdivision of Section 14 of the Shipping Act, 1916. The Secretary of Commerce now finds himself embarrassed in his "regulatory" capacity in passing on the question of the lawfulness of an "exclusive contract" system which he himself through his representatives has agreed to and is promoting for the purpose of coercing and unfairly competing with appellant, and for the purpose of compelling American shippers to ship only on vessels belonging to the conferences or shipping combination. He finds himself still more embarrassed in attempting by his order of November 18, 1935, here involved, to compel appellant in practical effect to charge rates fixed by the foreign flag majority in the conferences or shipping monopoly on the basis of that very conference agreement which illegally coerces shippers and independent steamship companies. One solution for such a situation would have been to compel every steamship company to join such a shipping combination, or to observe the combination or monopoly-fixed rates, and thus preclude and estop all of them from questioning the legality of that type of shipping-combination agreement already condemned by this Court. That solution is the one the Secretary of Commerce is attempting by the order here involved. Congress never intended in the Shipping Act, 1916, or other statute, to authorize the regulatory powers of the Shipping Board to be exercised for the purpose of ending all free competition in the steamship business, and of creating or furthering a complete shipping monopoly in American foreign commerce, to the prejudice of independent steamship companies and American shippers;—and especially not when the facts

established by the evidence are that every one of the conferences or combinations is dominated by the foreign-flag "conference" companies constituting the majority. Congress did not intend by Section 15 of the Shipping Act, 1916, to authorize the Shipping Board (or the Secretary of Commerce) to "approve" the very "exclusive-contract" agreement which this Court condemned as illegal and obviously contrary to any reasonable or sound public policy in *Thomsen* v. *Cayser,* 243 U. S. 66, and which Congress condemned in the deferred-rebate subdivision of Section 14 of that same Shipping Act, 1916.

Assuming that the Secretary of Commerce, although a competitor of appellant, could regulate appellant, surely the Secretary could not delegate to appellant's private competitors the Secretary's power of regulating appellant. But that is what was done in substance by the present order, viewed in the light of the uncontradicted evidence and allegation in the complaint that foreign shipowners dominate and control every one of the conferences or shipping combinations and initiate and fix the freight rates in every one of those conferences.

The effect of the present order is, by immediate publication of appellant's current commodity-shipment and rate transaction between designated points, to compel appellant to charge such conference rates by depriving appellant of a reasonable and necessary degree of flexibility or adaptability to actual competitive conditions so far as freight rates quoted or charged by it are concerned.

The Secretary of Commerce's order was not issued so that he could acquire information for his or the Government's guidance in formulating regulations. The order was issued as a regulation itself. The order is in substance and practical effect a broadcasting of the

whole of appellant's current business transactions and of all of appellant's current records of commodity movements between designated places and of actual freight rate transactions with its customers. The order has been issued for the purpose of letting all appellant's competitors and all shippers know what actual business transactions appellant has been conducting and to compel appellant to keep its future freight rates stabilized or fixed at the same level as the conferences or shipping combinations whose rates are initiated and fixed exclusively by the foreign-flag lines which constitute the majority and which are subject to no control or power of regulation by the Secretary of Commerce, excepting a mere veto power, without authority to substitute a reasonable or just rate.

There is no sufficient reason shown for subjecting all of appellant's current business transactions and records to publicity, so that all of appellant's competitors and all shippers can know every business transaction entered into by appellant and by American shippers who have shipped goods on appellant's vessels, and know just what commodities appellant has just carried, and what commodities those American shippers have just sold or have consigned to designated foreign markets.

The conference lines or shipping combinations have power under the order of the Secretary of Commerce of November 18, 1935, to impose their will on appellant. The information from appellant's private records to be made available to them by the terms of this order is sufficient to enable the conference lines to take away from appellant its business in carrying the specified commodities between the places and ports required to be disclosed. The allegations in the complaint, and the evidence introduced, by appellant establishing this are uncontradicted. The evidence is also uncontradicted that a majority in a conference has power, not merely to advise and recom-

mend, but to coerce, and that the majority in each of the conferences competing with appellant consists of foreign lines, the American lines being in each conference a minority. The decision or agreement of the majority in a conference with respect to rates is final and effective and binding on all members of the conference unless disapproved by the Shipping Board (or Secretary of Commerce). The Shipping Board has merely the power of veto or disapproval. It cannot initiate or direct any rate or fix any maximum or minimum rate in foreign commerce. If not disapproved by the Shipping Board the rates filed by the conference are effective, and no hearing is provided for before either the Shipping Board or a Court to find or determine whether or not the rates are reasonable or wise or just. No hearing is provided at which objections to the rates in point of law or policy may be submitted and considered. The rates so fixed for vessels of all companies may be unreasonably high and prejudice slippers and independent steamship companies by throwing all business to the fastest and largest foreign conference line steamers. Or such rates may be made unreasonably low temporarily on the dates of independent line steamer sailings until an unsubsidized independent company like appellant will be driven from the trade or destroyed.

The decision of the majority in a conference represents its own unfettered judgment in furthering its interest and profit.

There is no method available by which appellant can obtain a hearing before the Shipping Board or a Court to have it determined whether such rates—or any existing conference line rates—are reasonable. The conference line rates may be, and are, arbitrarily fixed by the majority in the conference. Such rates may be less than reasonable cost, or less than cost plus reasonable profit, or may be higher than cost plus reasonable

profit. Neither the Shipping Board nor anyone else under the law as it now stands can dictate to the majority in a conference what its rates or tariffs in foreign commerce shall be. The Shipping Board can disapprove any rate schedule or agreement filed with it by the conferences, but it is not required to, and has never, held a hearing at which objections to the conference line rates in point of law or policy could be submitted and considered; and the Record shows no instance in which any conference line rate filed with the Shipping Board or the Secretary of Commerce has ever been disapproved, or a hearing held to determine its reasonableness, or a finding made with respect to its reasonableness. On the contrary the Record shows that the Shipping Board (or Secretary of Commerce) has joined forces with the conference lines and has become a partisan or "faction interested in the event" (*Doty* v. *Love*, 295 U. S. 64, 71) by entering its own vessels in the conferences or shipping combinations, and the Record further shows that these very Shipping Board vessels are operating commercially and are competing with appellant's vessels in the same trade. Any contention therefore that the Shipping Board exercises control over the conference rates to protect shippers or non-conference steamship companies against unreasonable freight rates charged by the conferences, or against unfair competition by the conferences, is without support in the Record.

There is no reasonable or valid ground for this order. But even if there were, there is no occasion to consider whether one or more of the grounds or purposes of the order would be reasonable and valid if separated from the others. When unreasonable and invalid grounds are so piled up as to make the valid ground a shadow, this Court's judgment will be controlled by the underlying reality rather than the form or label. The

grounds now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. *Worthen Co.* v. *Kavanagh,* 295 U. S. 56, 62. So viewed they are seen to be an invalid, oppressive and unnecessary destruction of appellant's right to a reasonable opportunity to compete freely with the Secretary of Commerce's vessels and with the vessels in the shipping combinations or conferences.

Looking to the surface of the order and no farther, it is invalid because no ground is specified to support it. All that the order does upon its face is to recite vaguely that it is issued under the regulatory powers conferred on the Shipping Board by the Shipping Act, 1916, and that it is necessary to know the freight rates which have been charged by all carriers in foreign commerce in order to issue regulations. No reason appears on the face of the order for limiting its application or scope to the appellant company instead of to all carriers in foreign commerce. But the Shipping Act, 1916, expressly limits the Shipping Board's power to regulate freight rates to *interstate* commerce (Section 18, Shipping Act, 1916) excepting that it can approve or disapprove freight rate agreements or schedules in foreign commerce which steamship lines forming conferences or combinations file with it to avoid prosecution under the Sherman Anti Trust Act (Section 15, Shipping Act, 1916). And the Board's power to regulate freight rates has not been extended since that Act excepting in the Intercoastal Shipping Act, 1933, to *intercoastal* commerce (U. S. C., Title 46, Secs. 843-848).

Aside from its powers under Section 15 of the Shipping Act, 1916, the only power given the Shipping Board by the Shipping Act, 1916, (or by any later statute), over freight rates in foreign commerce is not of a regulatory or legislative character, but of a judicial character with respect to offenses committed in violation of the pro-

visions prohibiting acts of unjust discrimination and the giving of deferred rebates, and providing penalties therefor. That judicial power can only be exercised after a proceeding has been instituted before the Shipping Board against the alleged violator. Such proceeding can be instituted by the filing of a complaint with the Shipping Board by a shipper or other person charging a carrier with an act of unjust discrimination, and praying for the imposition of the statutory penalty. Or the Shipping Board may itself act as prosecutor in instituting such a proceeding and claiming such penalty. But no proceeding has ever been instituted against appellant, nor has anyone ever filed a charge against it either before the Shipping Board or before any other commission or court alleging unjust discrimination or other offense by appellant under the Shipping Act or other statute. The order, therefore, cannot be justified on the theory that it is in aid of a judicial proceeding before the Shipping Board, or on the theory that it is a prosecution or proceeding instituted by the Board itself, and to be heard and determined by itself, charging appellant with a violation of any specified provision of the Shipping Act.

Assuming, merely for purpose of argument, that the order is valid on its surface, the question remains whether it has been so interpreted or applied as to bring out defects that were lurking underneath.

> *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289;
> *Merchants' National Bank* v. *Richmond,* 256 U. S. 635, 637;
> *Kansas City So. Ry. Co.* v. *Road Improvement District No. 6,* 256 U. S. 658, 659;
> *Doty* v. *Love,* 295 U. S. 64, 71.

The Record shows no rate war either existing or in the recent past. Nor is there any evidence that appel-

lant or any other carrier has ever charged a freight rate which is less than cost plus reasonable profit such as existed in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 372. Nothing in the nature of an existing evil to be remedied is shown in the record. And any evil that Congress had in mind was nineteen years old because the statute (Section 21 of the Shipping Act, 1916) which the Secretary of Commerce invokes as authority was enacted that long ago.

Section 21 was intended to enable the Shipping Board to acquire information or records in connection with the specific regulatory powers which was conferred on it. The Shipping Board was granted no general power of regulation (such as the General Welfare Clause of the Constitution), and as this Court said in *Carter* v. *Carter,* 298 U. S. 238, we must, if the Secretary will not specify under which regulatory power he is issuing the order, examine each one of the specific regulatory powers granted him to ascertain whether any of them authorizes such an order. This is not difficult to do because only a few regulatory powers are given to the Shipping Board (or Secretary of Commerce), and none whatever (excepting those under Section 15, Shipping Act, 1916, and those not here involved of a judicial nature after complaint filed by a shipper or by proceeding instituted directly by the Board) so far as foreign commerce is concerned.

In case of monopoly the right of the Government to regulate is necessarily primary, and private rights are subordinate. The conferences and shipping combinations are, therefore, properly subjected by Congress to regulation by the Shipping Board. But the appellant is an independent steamship company which is not in any sense a monopoly or part of a monopoly. The Shipping Board's powers of regulation in foreign

commerce are limited to regulating the shipping monopoly created under Section 15 of the Shipping Act, 1916.

The fact that the Shipping Board has itself joined the monopoly which it is regulating is no reason for impliedly giving it power to regulate an independent steamship company which is no part of the monopoly and whose continued existence as an independent company Congress clearly intended and contemplated in the provision in the Shipping Act restricting the Shipping Board's power of regulation to the monopoly or shipping combinations.

There is no limitation in section 15 of the Shipping Act, 1916, that the agreements of the shipping combinations shall not create or promote monopolies such as is contained in the National Industrial Recovery Act of June 16, 1933. And yet that latter Act was rejected by this Court as unconstitutional in the *Schechter* case, 295 U. S. 495.

This order compels appellant to disclose to its competitors all its current business transactions and records or book entries during the six weeks' period preceding the issuance of the order so far as concerns particular commodities carried, and between what points carried, and the rate which has been charged or collected on each of those commodities. With that information as to appellant's business transactions, and as to the trend and exact nature and times of the particular commodity movements, appellant's competitors can easily identify every one of appellant's customers and shipments and can arrange for competing vessels to be present at each of the disclosed shipping points, quoting (until appellant is driven out of business) a rate less than appellant has been able to obtain as shown by its own private books.

There is no restriction imposed by law on the right of appellant's competitors to reduce or change their rates at any time and without notice (until the expiration of thirty days after they have been put into effect), and the Shipping Board (or the Secretary of Commerce) has no authority under the law to impose any such restriction, and has not tried to impose it. The schedules of rates which the steamship companies belonging to the shipping combinations or conferences are required to file with the Shipping Board in order to avoid prosecution for violating the Anti-Trust Law, are not required to be maintained for any fixed period, and can be abandoned by decision of the majority in the combination or conference five minutes after they have been filed. The Shipping Board has no power of initiating or fixing a rate to be charged in foreign commerce by a shipping combination or by any steamship company, that being done by decision of representatives of the majority in the combination. And the Record shows without contradiction that the majority in every one of the combinations consists of foreign shipowners operating foreign flag vessels.

The appellant is the only steamship company in American foreign commerce which has not joined a shipping combination under section 15 of the Shipping Act, 1916, and it desires to continue as such independent or non-conference company. Congress has never said that a steamship company must join a shipping combination, and has never given authority to the Shipping Board to compel appellant to join one.

Indeed Congress plainly intended that free competition should continue between steamship companies engaged in American foreign commerce, and has not authorized the creation or furtherance of a complete shipping monopoly with monopoly-dictated freight rates such as the Secretary of Commerce is attempting

to create by the present order. And the fact that appellant does not wish to join the shipping trust is no reason for the Secretary of Commerce to subject it to unjust discrimination by the order here sought to be enjoined.

The Secretary of Commerce by the present order is attempting to set up a kind of compulsory system of trade codes or conference agreements in the shipping business in American foreign commerce, such as was declared illegal and unconstitutional by this Court in the *Schechter* case, 295 U. S. 495. The Secretary of Commerce has himself joined certain of those shipping combinations by voluntarily entering in them the vessels he is operating in merchant service and thereby becoming with other American vessels a minority member or factor without control (excepting to the extent of a mere veto power over "unlawful" agreements) over the majority consisting of foreign flag shipowners. The present order is in practical effect a form of coercion on appellant to join a shipping combination.

Nor is sufficient reason shown for subjecting appellant to this unjust discrimination, no other steamship company having been subjected to such an order as the present one. No other carrier is required to disclose to either the Secretary of Commerce or to the public or to its competitors the actual commodities it has carried, or the places between which it has carried them, or the rates it has actually charged or collected, or what terminal facility or other service it has afforded. A schedule of rates for the future, which need not be maintained or adhered to in practice, is a very different thing from a complete disclosure of all of a carrier's current business transactions, and of its shippers' business transactions, such as the present order requires.

CONGLUSION.

The final decree of the District Court should be reversed with costs, and the cause should be remanded to the District Court with instructions to enter a final decree in favor of appellant, enjoining premanently the enforcement of the order of the Secretary of Commerce of November 18, 1935.

Respectfully submitted,

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